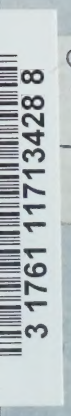

Courts, the charter, and labour relations

Background Paper

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THE COURTS, THE CHARTER, AND LABOUR RELATIONS

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Law and Government Division

April 1993

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THE COURTS, THE CHARTER, AND LABOUR RELATIONS

INTRODUCTION

The enactment of the *Canadian Charter of Rights and Freedoms*[1] in 1982 marked the beginning of a new era in constitutional review and a new relationship between the courts and government. The Charter elevated selected rights and freedoms, such as freedom of association, freedom of expression and equality rights, to the stature of "the supreme law of Canada." The courts were made the arbiters of this supreme law. Any law that was found to be inconsistent with the Charter would be declared by the courts to be of no force or effect,[2] and anyone whose rights or freedoms, as guaranteed by the Charter, had been infringed or denied by some action of government could apply to an appropriate court for an appropriate remedy.[3] Thus, the courts were entrusted with protecting these special rights from unreasonable state incursions.[4] In addition, they became responsible for breathing life into these rights by interpreting their full scope and meaning.

General, critical reaction to the courts' new role under the Charter was mixed. Some felt that empowering the courts to review the actions of government was inconsistent with our liberal democratic tradition of parliamentary supremacy and that, in any event, the courts would be ill-suited to perform the new and daunting task assigned to them.[5] Others viewed

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(1) *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter the Charter and the Constitution, respectively].

(2) Constitution, s. 52.

(3) Charter, s. 24.

(4) The rights and freedoms guaranteed by the Charter are subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society": Charter, s. 1.

(5) See generally, for example, H.W. Arthurs. "'The Right to Golf': Reflections on the Future of Workers, Unions and the Rest of Us under the Charter," *Labour Law Under the Charter* -

(continued...)

the courts' new review power as presenting a tremendous opportunity for socially, economically and politically disadvantaged persons to challenge repressive government policies and laws to a test of constitutional strength in an apolitical forum.(6)

With respect to labour relations, observers' opinions about the probable impact of the Charter were similarly mixed. Predictions tended to reflect how much faith labour commentators would or would not place in the courts' ability to recognize and enforce the collective rights of workers. The following comments are illustrative.

From the optimists' camp:

> With the entrenchment of the Charter, those who feel adversely affected by decisions taken in the name of majority rule are empowered to activate a debate of legitimation in which the ethical (constitutional) integrity of the majority's decision has to be explained and justified in a particular way. ... If workers as a group, and especially those who are least well off, can make use of the courts to encourage our legislators and their delegates to treat them with more concern and respect, that will provide powerful confirmation of the ability of the courts to enhance the democratic quality of our government.(7)

From the pragmatists' camp:

> The Charter now creates the potential for virtually every labour relations issue to be outfitted in constitutional clothing, handing over to constitutional lawyers and judges a wide discretion to re-shape the Canadian labour law system. ... It is interesting to conjecture as to just what evidence will be required to establish that a law constitutes a reasonable limit that can be justified in a

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(5)(...continued)
Proceedings of a Conference, Queen's Law Journal and Industrial Relations Centre, Kingston, 1988, p. 17; Michael MacNeil, "Courts and Liberal Ideology: An Analysis of the Application of the *Charter* to Some Labour Law Issues," *McGill Law Journal*, Vol. 34, 1989, p. 86. Paul Wieler and David Beatty summarize the sceptics' views in their articles: Paul C. Weiler, "The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law," *University of Toronto Law Journal*, Vol. 40, No. 2, Spring 1990, p. 141 - 151 and David M. Beatty, "Shop Talk: Conversations About the Constitutionality of Our Labour Law," *Osgoode Hall Law Journal*, Vol.27, No.2, 1989, p. 382.

(6) David M. Beatty is one of the proponents of this position. See, for example, *ibid.*, p. 382 - 447.

(7) *Ibid.*, p. 384 and 387.

> free and democratic society. It is difficult to see how the courts can perform this exercise without searching analysis of the economic and political considerations underlying the legislation, yet it is not at all clear that the courts are comfortable with such an approach.(8)

And finally, from the pessimists' camp:

> [I]t is difficult to believe that the courts, whose historic function has been to protect individual property rights and facilitate free contracting, will use the Charter in ways that will positively affect workers, a class of people without property who have been historically exploited by the wage contract.(9)

It was expected that, with time and the release of the first few landmark freedom-of-association cases from the Supreme Court of Canada, the direction in which the Charter (and the courts) would be taking labour relations would become clear. In retrospect, however, clarity is not the word that has characterized the courts' labour decisions so far. For example, by 1986-87, when the first significant labour-related decisions started to come out of the Supreme Court of Canada, the Court had abandoned its initially unified front and activist-liberal approach and was entering into a phase of division and dissension. As a statistical analysis of the Supreme Court's first hundred Charter decisions demonstrates, disagreement between the more-activist and more-restrained members of the Court increased remarkably after 1986, a phenomenon which is reflected in the Court's hotchpotch of labour rulings to date.(10) The Supreme Court's Charter decisions have occasionally produced positive results for organized labour, but generally the results for unions have been bad news, compounded and confounded by sharply divided rulings.

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(8) Donald D. Carter, "Canadian Industrial Relations and the Charter -- The Emerging Issues," *Queen's Papers in Industrial Relations*, 1987-2, Industrial Relations Centre, Queen's University, Kingston, 1987, p. 9 - 10.

(9) Judy Fudge, "Labour, the New Constitution and Old Style Liberalism," *Labour Law under the Charter - Proceedings of a Conference*, Queen's Law Journal and Industrial Relations Centre, Kingston, 1988, p. 110.

(10) F.L. Morton *et al.*, "The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis," *Osgoode Hall Law Journal*, Vol. 30, No. 1, Spring 1992, p. 1. See especially, p. 8 - 15 and 36 - 48.

This background paper will survey the higher courts' labour-related Charter decisions and attempt to summarize their implications. In doing so, it will focus primarily on decisions rendered by the Supreme Court of Canada and on the majority, rather than the dissenting, views of that Court.

The paper will be presented in three main sections, based on the three levels of inquiry in which the courts must engage when conducting a full Charter review, since decisions significant to labour relations have been made at each of these levels. At the first level of inquiry, the courts must determine whether the Charter applies to the case under consideration. At the second level of inquiry, the courts must decide upon the meaning and scope of the Charter right or freedom under consideration and whether it has been infringed. Finally, if a right or freedom is found to have been infringed, then at the third level of inquiry the courts must determine whether the government's violation of the Charter in the case under consideration can be demonstrably justified in a free and democratic society, and, therefore, be countenanced.

APPLICATION OF THE CHARTER TO LABOUR RELATIONS MATTERS

The Charter's protective reach is limited by section 32, which states, with respect to the federal domain, that: "This Charter applies to the Parliament and the government of Canada in respect of all matters within the authority of Parliament ... ." The courts have been confronted with some interesting questions when interpreting this section in the context of labour relations. For example, does the Charter apply to an injunction issued by a court in a private sector labour dispute; does the Charter apply to collective agreements; does the Charter apply to union by-laws; and, does the Charter apply to persons, such as adjudicators, exercising authority delegated to them by government? The courts' answers have produced a rather complex body of law, delineating Charter and Charter-free realms in the labour relations field according to intricate notions of "public" and "private" activities, the former being subject to Charter scrutiny, the latter not.

A. Application of Charter to Private Litigation and the Common Law

In 1982, locked-out employees of a private company, Purolator Courier, planned to picket the premises of another private company, Dolphin Delivery Ltd., unless the latter ceased doing business with their employer. Their union notified Dolphin Delivery of their intentions and Dolphin Delivery applied for a court injunction to restrain the threatened action, called secondary picketing. The application was successful. The court had resolved the tension between the private litigants by applying the common law rules that make secondary picketing tortious and illegal.

The union's position, in subsequent court appeals, was that the common law principles applied by the judge in granting the injunction had the effect of infringing the union members' freedoms of expression and association. Thus, on appeal, the Charter formed the basis for the union's challenge to the injunction. The questions of Charter application raised by this appeal were: whether the Charter applies in private litigation (that is, whether the alleged infringement of a Charter right or freedom could be the basis for a challenging an injunction issued in a private law suit) and whether the Charter applies to the common law (that is, whether a court order enforcing a rule of the common law is subject to the Charter).[11]

Dolphin Delivery eventually reached the Supreme Court of Canada, which ruled that the Charter does not apply in private litigation, unless some governmental action triggered the Charter. The Charter was set up to regulate the relationship between individuals and government, not to form the basis for legal disputes between private individuals.[12] Since the parties to the legal dispute in this case were private individuals involved in a private dispute based on common law principles, no government action could be found to trigger the application of the Charter -- unless the judge's reliance on common law rules and their enforcement by way of an injunction could be found to constitute government action.

On this question of whether the Charter applies to the common law as enforced by a court order, the Supreme Court found that under section 32 the Charter applies only to

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(11) *Retail, Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 582 [hereinafter *Dolphin Delivery*].

(12) *Ibid.*, p. 593.

"government," that is, the executive and administrative branches of government, but not to the judicial branch of government.(13) It held, therefore, that a court order would not constitute the type of government action that would attract the application of the Charter. It reasoned that, if a court order were regarded as the type of government action to which the Charter applies, the scope of the Charter would be expanded to include virtually all private litigation, since all cases carried to completion must end with some type of order. In summary, it concluded that a court order resolving a dispute between private parties, based on the common law, would not constitute the sort of government action to which the Charter applies.(14)

The *Dolphin Delivery* decision has been sharply criticized by a number of commentators. For example, Professor Manwaring has argued that the Court was wrong to focus on whether a court order would constitute a government action subject to review under the Charter. He suggested that the proper question should have been whether the common law rules prohibiting secondary picketing, applied by the lower courts, constituted state action reviewable under the Charter:

> The state action is not the court order itself, but the rule upon which the court order is based. It is not the court order which is subject to constitutional review, but the set of legal rules which establish the backdrop against which the court issues its orders. As long as the rules can withstand constitutional scrutiny, the Constitution will not apply to private litigation. The Supreme Court of Canada does not distinguish between the action of the court in issuing its order and the legal rules which create the legal context in which the order is issued.(15)

In addition, Professor Beatty has pointed out the rather absurd implications of this ruling:

> [I]t turns the entire organization of our system of government, and the place of the Constitution, on its head. In putting the judge-made rules of contracts, property, tort, *et cetera*, beyond the reach of the *Charter* whenever they regulate the behaviour of two or

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(13) *Ibid.*, p. 598 - 599.

(14) *Ibid.*, p. 600 - 601.

(15) J. A. Manwaring, "Bringing the Common Law to the Bar of Justice: A Comment on the Decision in the Case of *Dolphin Delivery Ltd.*," *Ottawa Law Review*, Vol. 19, No. 2, 1987, p. 413 at 442.

> more individuals or groups, the Court disregarded the principle of constitutional supremacy enshrined in section 52 of the *Charter*. It elevated its own rules to a position above and beyond the Constitution itself. It reversed the hierarchy that logically exists between constitutions and ordinary subordinate law and, in so doing, licensed the judges and the third branch of government to exercise their legal authority free of any constitutional constraints.[16]

In spite of all the criticism, the Supreme Court has not reversed its ruling in *Dolphin Delivery*. The case continues to stand as good authority for both the proposition that the Charter does not apply to disputes between private parties and, with respect to the judicial review of court orders under the Charter, that the courts will not subject to Charter review orders based on the common law and resulting from litigation between private parties.

This ruling produces the anomaly that once a common law rule is entrenched or modified by legislation, as the secondary picketing rules were by British Columbia's *Industrial Relations Act,*[17] the statutory rule will become subject to the Charter. But, as long as the rule is derived only from the common law, it will escape Charter review. As a result of *Dolphin Delivery*, the source of a law is now relevant to its reviewability under the Charter: if the impugned law is strictly a rule of common law, then the Charter will not apply, but if it is rule based in statute law, then the Charter will apply. As far as private labour disputes are concerned, therefore, the Charter does not hold out much hope as an instrument for challenging anti-labour common law rules. Statutory amendments to unacceptable common law rules would appear to be the only remedial avenue open.

Since the decision was rendered in *Dolphin Delivery*, the Supreme Court of Canada has revisited the question of the reviewability of court orders under the Charter. In another unlawful picketing case, *B.C. Government Employees' Union* v. *A.-G. B.C.*,[18] the Supreme Court of Canada considered whether an order of the Chief Justice of the B.C. Supreme

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(16) D. M. Beatty, "Labouring Outside the Charter," *Osgoode Hall Law Journal*, Vol. 29, 1991, p. 839 at 843.

(17) R.S.B.C. 1979, c. 212, s. 85.

(18) [1988] 2 S.C.R. 214 [hereinafter *BCGEU*].

Court infringed the Charter rights and freedoms of union members; and, as a preliminary matter, it considered whether the court's order was or was not subject to Charter scrutiny. The Court ruled that the order in this case could be subject to Charter scrutiny by distinguishing the nature of the disputes in *BCGEU* and *Dolphin Delivery*. It noted that in the *Dolphin Delivery* case the court order was based on common law rules applied to a *private* dispute; however, in the *BCGEU* case, the court order, though based on common law rules, was originated, not by a private dispute, but by the court itself on its own motion. It was held that the court's action was more *public* in nature and, therefore, should be subject to Charter scrutiny.(19)

Dolphin Delivery in effect created a Charter-free zone for certain aspects of labour relations. Those activities governed by legislation or affected in some other way by concrete government involvement would be required to stand up to Charter scrutiny; those activities involving private parties and common law principles would operate outside the realm of Charter accountability.

B. Application of the Charter to Collective Agreements

Collective agreements are the cornerstones of labour relations systems. They set out the rules that govern the employment relationship between an employer and certain employees, including recognizing the bargaining rights of the union, prescribing the terms and conditions of employment and dispute resolution procedures, and declaring the legality of various activities engaged in by the employer, employees or union.(20) A collective agreement represents a *private* system for ordering an employment relationship.

On the other hand, a collective agreement can have a *public* or governmental dimension. Labour statutes can affect the contents of collective agreements by permitting or requiring the inclusion of certain clauses; for example, permitting the inclusion of a "closed-shop clause" (i.e., a provision in a collective agreement requiring the employer to hire only union members). Also, a government can be involved in collective agreements as an employer and

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(19) *BCGEU*, p. 244.

(20) G. W. Adams, *Canadian Labour Law*, Canada Law Book, Aurora, 1985, p. 670.

party to various agreements. Given the mixture of *private* and *public* aspects of collective agreements, and the Supreme Court's finding in *Dolphin Delivery* that the Charter applies only to governmental and not to private actions, a number of interesting issues have arisen with respect to the Charter's applicability to collective agreements.

In *McKinney* v. *University of Guelph*,[21] a Charter challenge to mandatory retirement, the Supreme Court was asked to decide as a preliminary matter whether the Charter applies to a university. The university in question was a private corporation, created by a statute, funded in part by government, performing an important public service. Weighing all these characteristics, the Court decided that the university was not subject to the Charter. The mere fact that it was a legal entity created by a statute was not enough to make the Charter apply.[22] The university had been created by statute in order to make it a legal "person" or entity that would be self-governing and responsible for its own actions. It was incorporated so as to have the same proprietary and contractual powers as a private individual, not so that it would become an apparatus of government, implementing government objectives and exercising powers delegated to it by government. The Court held that a close nexus between the enabling statute, its legislative scheme, and governmental powers of administration would be required in order for the Charter to apply.[23] "The exclusion of private activity from the Charter was not a result of happenstance. It was a deliberate choice which must be respected."[24]

In another Charter challenge to mandatory retirement, *Douglas College* v. *Douglas/Kwantlen Faculty Association*,[25] the Supreme Court had to decide whether a college, rather than a university, would be subject to the Charter. It answered the question affirmatively. The characteristics of the college were different from those of a university; the government nexus was much stronger. For example, the college was a Crown agency established by the

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(21) [1990] 3 S.C.R. 229 [hereinafter *McKinney*].

(22) *Ibid.*, p. 265.

(23) *Ibid.*

(24) *Ibid.*, p. 262.

(25) [1990] 3 S.C.R. 570 [hereinafter *Douglas College*].

government to implement government policy; its board was appointed and removable at the pleasure of the government; and the government could at all times, by law, direct the operations of the college. Therefore, the college was found simply to be an apparatus of government and its activities in negotiating and administering the collective agreement between itself and the union were government actions, subject to the Charter pursuant to section 32.[26]

The Supreme Court of Canada has also considered the question of whether labour legislation that allows private parties to incorporate specific clauses in their collective agreements constitutes sufficient government involvement to attract the application of the Charter. In *Re Bhindi and B.C. Projectionists Local 348*,[27] two non-unionized projectionists challenged the validity of a closed-shop provision in the collective agreement between the B.C. projectionists' union and Famous Players Ltd.

Since the parties to the collective agreement were non-governmental entities, the only possible link to government and hook to make the Charter apply was the fact that the impugned closed-shop clause had been negotiated in accordance with provincial legislation which permitted, but did not require, such a clause. The B.C. Court of Appeal ruled in this case that the closed-shop provision did not constitute government action. The legislation did not require the parties to negotiate a closed-shop provision; it simply allowed them to do so. They negotiated a private contract as private individuals, and the government's permission to include a closed-shop provision in their private agreement did not transform the closed-shop provision into government action.[28]

The ruling in *Re Bhindi* by B.C.'s Court of Appeal was supported by the Supreme Court of Canada, which refused to hear its further appeal and referred to *Re Bhindi* with approval years later in the *Lavigne* case.[29] The issue of the Charter's application in *Lavigne* was quite similar to *Re Bhindi* in that it involved a provision in a collective agreement which

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(26) *Ibid.*, p. 584.

(27) (1986), 29 D.L.R. (4th) 47 (B.C.C.A.) [hereinafter *Re Bhindi*].

(28) *Ibid.*, p. 56; leave to appeal to S.C.C. refused (1986), 73 N.R. 399 (note) (S.C.C.).

(29) *Lavigne* v. *Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 [hereinafter *Lavigne*].

was authorized, but not required, by legislation. The provision, following the Rand formula, provided for the compulsory deduction of union dues from members of the bargaining unit, union and non-union members alike. As in *Re Bhindi*, the Court ruled that the legislative authority to negotiate such a provision was not sufficient to attract the application of the Charter. It reasoned that "parties to collective agreement negotiations would be free to agree to art. 12 [the Rand formula clause] independently of any legislative 'permission'... . Such provisions are not, in other words, illegal or invalid in the absence of legislative prohibition."(30)

The Court's reasoning in this instance has been criticized because, under the common law, a closed-shop or Rand formula provision in a contract would be considered unenforceable and unlawful.(31) "The contractual powers of unions are purely statutory in nature and differ profoundly from purely private contractual powers."(32) Absent the statutory authority to agree to impose certain terms on an employer or employee, the common law would prevail and contractual obligations, for example, to pay union dues, could be created only with the employee's agreement. "[I]t is clear that the dissident employee was being subjected to a statutory power of compulsion as surely as if the statute [and government] had directly ordered him to pay the dues [or join the union]."(33)

Had this reasoning been adopted by the majority in *Re Bhindi*, rather than only by a dissenting justice, the Charter would have applied to a collective agreement arrived at between private parties. Evidently, the B.C. Court of Appeal did not want this case to open the door to Charter scrutiny of private contracts. In the *Lavigne* case the outcome was different. The Court found in *Lavigne*, as in *Re Bhindi*, that the Charter did not apply to the collective agreement because of the government nexus created by the legislation which permitted the adoption of the Rand formula; however, the Charter was found to apply for other reasons.

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(30) *Ibid.*, p. 310.

(31) See P. W. Hogg, *Constitutional Law of Canada*, 3rd ed., Carswell, Toronto, 1992, p. 838 - 839 and discussion in *Re Bhindi*, p. 66 - 72 (Anderson J.A. dissent).

(32) *Re Bhindi*, p. 72 (Anderson J.A. dissenting).

(33) Hogg (1992), p. 839.

In *Lavigne*, the employer was a community college which, as in the *Douglas College* case, was subject to the Charter as an apparatus of government. Argument was made in this case that, although the employer was "government," its actions in negotiating and administering the collective agreement were private, commercial, contractual and non-public in nature and should therefore stand outside the realm of activities subject to Charter scrutiny. The Supreme Court was not persuaded by this argument. It ruled that government must comply with the Charter when negotiating and implementing terms and conditions of employment:

> [G]overnment activities which are in form "commercial" or "private" transactions are in reality expressions of government policy, be it the support a particular region or industry, or the enhancement of Canada's overall international competitiveness. In this context, one has to ask: why should our concern that government conform to the principles set out in the *Charter* not extend to these aspects of its contemporary mandate?
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> ...
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> It must be borne in mind that the *Charter* is not intended to serve simply a negative role by preventing the government from acting in certain ways. It has a positive role as well, which might be described as the creation of a society-wide respect for the principles of fairness and tolerance on which the *Charter* is based. ... Through the process of applying the *Charter* to government decision-making, the government becomes a kind of model of how Canadians in general should treat each other. The extent to which government adherence to the *Charter* can serve as an example to society as a whole can only be enhanced if the government remains bound by the *Charter* even when it enters the marketplace.
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> ...
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> While the example the government may be able to set by conforming with the *Charter* when buying paper clips may be minimal, the example it can set by complying with *Charter* principles when negotiating the terms and conditions of employment could be significant.[34]

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(34) *Lavigne*, p. 314 - 315.

A separate system of review for some collective agreements has been established by these cases which delineate the applicability of the Charter. Agreements negotiated by parties in the private sector will not be subject to Charter scrutiny, since their negotiation and implementation would not constitute government action under the Charter. On the other hand, agreements involving the greater public sector will be subject to Charter scrutiny; indeed, in its capacity as employer the government is considered to be under a duty to set a positive example for private sector employers. As a result, mandatory retirement in the public sector, for example, can be reviewed against the Charter, whereas contract provisions and policies regarding mandatory retirement instituted by private sector employers cannot be challenged using the Charter (though alternative protection may be provided by other legislation, such as human rights statutes).

C. Other Questions of Charter Application

Some other important questions with respect to the Charter's application have included whether it applies to the by-laws of a union or to a supervisor's order. Since Parliament and the legislatures cannot pass a law that violates the Charter, are the bodies and persons to whom they delegate rule-making powers -- such as the authority to issue regulations, by-laws, and orders -- also subject to the Charter? The answer seems to depend on whether the rules or orders in question are private or public in nature.

In *Tomen* v. *Federation of Women Teachers' Associations of Ontario*,[35] the women teachers' union challenged a by-law of its federation (the Ontario Teachers' Federation, O.T.F.) as violating the Charter. The by-law in question required certain teachers, such as women and Catholics, to be members of certain teachers' associations, depending on their teaching assignments. Although the *Teaching Profession Act* required every teacher in Ontario to be a member of O.T.F., it did not require the O.T.F. to enact the impugned membership by-law. This by-law was a corporate by-law, authorized by the *Corporations Act* but autonomously conceived and passed by the board of governors of O.T.F. in order to regulate internal affairs.

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(35) (1989), 61 D.L.R. (4th) 565 (Ont.C.A.); leave to appeal to S.C.C. refused [1991] 1 S.C.R. XV [hereinafter *Tomen*].

The Ontario Court of Appeal considered it to be private in nature and not subject to the Charter. Quoting the trial court judge, it stated: "It is comparable to thousands of by-laws passed in Ontario by voluntary non-profit corporations to govern membership in the particular corporation."(36)

In contrast, an order to carry out a government function (i.e., to approve abortion expenses) given to an employee by an administrator in the public service was considered to be part and parcel of the exercise of governmental power and could not be characterized as a private action. The B.C. Court of Appeal, which decided the case, held that the employee, who was fired for refusing to process the claims as ordered, could challenge her dismissal on the basis that it breached her Charter rights.(37)

Since the government in this case delegated the authority to make orders to the office supervisor, the orders could be subjected to Charter scrutiny. The impugned order was a government act in the sense that government required the supervisor to make the order. On the other hand, the O.T.F. membership by-law was not required by government. Although the general authority to make by-laws derived from legislation (the *Corporations Act)*, the impugned membership by-law was arrived at privately as a matter of internal management and as such was not subject to the Charter.

D. Jurisdiction to Consider Charter Questions

As the boundaries for reviewing labour relations matters under the Charter have been delineated by the courts, the related matter of jurisdiction to consider Charter questions has been pondered. The labour relations system includes its own decision-making bodies, such as labour boards, which operate separately from the court system and are often empowered to make final and binding decisions with respect to facts and law. Given the need for finality, speed, and special labour expertise in making labour rulings, the courts usually defer to labour tribunals and exercise restraint when called upon to practise their general supervisory role over such

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(36) *Ibid.*, p. 572.

(37) *Moore* v. *R.* (1988), 50 D.L.R. (4th) 29 (B.C.C.A.); leave to appeal to S.C.C. refused (1988), 50 D.L.R. (4th) vii.

administrative tribunals.[38] But do these administrative bodies have the requisite authority to deal with Charter questions, particularly to order remedies for Charter violations, and should the courts continue to exercise deference when a Charter question, which requires constitutional expertise and not only labour expertise, is raised with a tribunal? These two issues have been addressed by the courts.

Most recently, in *Cuddy Chicks*[39] the Supreme Court of Canada held that the Ontario Labour Relations Board had the jurisdiction to consider whether a provision in its governing legislation which excluded agricultural workers from collective bargaining violated the Charter. It noted that "a tribunal prepared to address a Charter issue must already have jurisdiction over the whole of the matter before it, namely, the parties, subject-matter and remedy sought."[40] It cautioned, however, that the jurisdiction of the board is limited in at least two respects. First, it can not expect curial deference to be practised with respect to its Charter decisions. Second, it does not have the power formally to declare a statutory provision invalid; this remedy is available only to the superior courts. The board can simply treat the impugned provision as invalid for the purposes of the matter before it.[41]

Earlier, in *Douglas College,* the Supreme Court of Canada had considered whether an arbitrator deciding a grievance under a collective agreement may apply the Charter and grant the relief sought for its breach. Similar to its later ruling in *Cuddy Chicks* with respect to the Ontario Labour Relations Board, it held that an arbitrator may consider the Charter, as long as the arbitrator has jurisdiction over the parties and subject matter of the case and has the authority to provide the remedies sought. Here again, the Court noted that Charter rulings by arbitrators or other administrative tribunals should not receive curial deference, since the tribunals are not acting within the limits of their special expertise in such instances.[42]

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(38) Adams (1985), p. 153 - 154.

(39) *Cuddy Chicks Ltd.* v. *Ontario Labour Relations Board,* [1991] 2 S.C.R. 5 [hereinafter *Cuddy Chicks*].

(40) *Ibid.*, p. 14.

(41) *Ibid.*, p. 17.

(42) *Douglas College*, p. 596 and 605.

In *Moore,* the B.C. Court of Appeal had reached the same conclusion as the Supreme Court in *Douglas College*. An arbitration board hearing a grievance brought pursuant to a collective agreement which raised a Charter issue did have the authority to deal with the Charter question. In addition, the Court ruled that the arbitration board was the most appropriate forum for resolving this question, even though the superior courts have a limited residual jurisdiction over labour relations matters.[43] "The superior courts have discretion to decline jurisdiction where just and appropriate relief can be granted by another tribunal, and will exercise jurisdiction only where there is a need to do so."[44]

A recent ruling by the Ontario Court of Appeal in *Weber* v. *Ontario Hydro* contradicts the B.C. Court of Appeal's ruling in *Moore* with respect to the most appropriate venue.[45] The Ontario Court of Appeal did not agree that Charter claims brought by an employee against an employer should necessarily be resolved through the arbitration procedure established by the governing collective agreement. It held that policy reasons supporting judicial deference to labour tribunals do not apply with the same force when individual constitutional rights are involved. In cases arising out of employee-employer disputes, where the collective agreement provides for arbitration, questions regarding the appropriate forum for bringing Charter claims, and the proper degree of curial deference to exercise, are now unsettled. The Supreme Court of Canada may have to resolve the uncertainty.

What is clear, however, is the jurisdiction of arbitrators and labour boards to consider Charter issues and, also, the application of the Charter to all public sector collective agreements by virtue of the government's involvement in negotiating and administering these contracts. These rulings may have important implications for labour relations.

For example, with respect to public sector grievance arbitration, certain terms in collective agreements -- such as seniority and mandatory retirement provisions -- once accepted as the product of consensual negotiations and interpreted as a reflection of the workplace's

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(43) *Moore*, p. 38, 40 and 43.

(44) *Ibid.*, p. 38.

(45) Brad Daisley, "Take Charter Issues in Labour Disputes to Court: Ont.C.A.", *The Lawyers Weekly*, 15 January 1993, p. 7; see also (1992), 11 O.R. (3d) 609 (C.A.).

internal value system, can now be subjected to scrutiny under the Charter's external, judicially interpreted value system.(46) As Professor Carter notes, not only may the Charter thus change once firmly established arbitral principles, it may also invite the courts to exercise considerably less curial deference:

> The Charter has the clear potential to disrupt the internal accommodations reached by the parties through their own process of private ordering by emphasizing Charter values at the expense of the norms now set out in these collective agreements. ... [T]he very process of weighing Charter values against workplace values could alter drastically the nature of the grievance arbitration process by transforming what were once regarded as labour relations issues into legal and constitutional issues. Such a development could open grievance arbitration to much closer scrutiny from the courts and increase the frequency of judicial review. Instead of regarding an issue as being a labour relations matter and deferring to the arbitrator's decision, courts could now view the same matter as having a constitutional element that requires resolution at a higher level. If this does occur, then lawyers and judges will play a much greater role in shaping the arbitration process than they now do.(47)

It remains to be seen whether or not, under the cloak of Charter review of arbitration decisions, the courts will invade the "forbidden" field of labour relations. To date the courts have not appeared anxious to enter this field, evidenced by their decisions which exclude private disputes and private collective agreements from the ambit of Charter scrutiny.

A general reluctance to take on labour relations issues has also been demonstrated by the courts' decisions considering substantive aspects of Charter law, such as the scope and meaning of the freedom of association protection. Decisions of this nature fall under the second level of Charter inquiry, consideration of the meaning and scope of a right and whether it has been infringed. The results of these inquiries are summarized next.

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(46) Donald D. Carter, *Canadian Industrial Relations After Lavigne*, Current Issue Series, Industrial Relations Centre, Queen's University, Kingston, 1992, p. 3 - 8.

(47) *Ibid.*, p. 5.

THE RIGHTS AND FREEDOMS INVOKED IN LABOUR-RELATED CHARTER CHALLENGES

The Charter has been used to challenge the constitutionality of various labour laws, for example, back-to-work legislation, wage restraint legislation, and legislation prohibiting strikes and lock-outs. It has also been invoked to test the constitutionality of certain labour practices such as the compulsory check-off of union dues and the inclusion of mandatory retirement or closed-shop provisions in collective agreements. Finally, it has been used to challenge the legality of certain orders imposed on unions or employers by courts or administrative bodies. In spite of the variety of challenges launched, the Charter rights and freedoms drawn upon to protect the interests of employees, unions, and employers have been limited mainly to the following four: freedom of association, freedom of expression, equality rights and the right to life, liberty and security of the person. The courts' treatment of each of these rights and freedoms will be reviewed in turn.

A. Freedom of Association - Charter s. 2(d)

Section 2(d) of the Charter recognizes that everyone has the fundamental freedom to associate. It was left to the courts to determine the scope and meaning of this freedom. Could it protect the right of union members to strike and prevent governments from using legislation to extend unilaterally the duration of collective agreements or to order striking employees back to work? In a series of 1987 labour rulings (the "labour trilogy") a divided Supreme Court of Canada ruled that freedom of association did not protect the right of workers to strike.[48] The labour trilogy did not firmly resolve the issue of whether freedom of association could, nonetheless, apply to protect other collective bargaining rights. This question was finally settled unfavourably for unions in the Supreme Court's 1990 *PIPS* decision.[49]

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(48) The *labour trilogy* includes: *Reference Re Public Service Employee Relations Act [Alberta],* [1987] 1 S.C.R. 313 [hereinafter *Alberta Reference*]; *Public Service Alliance of Canada* v. *R.*, [1987] 1 S.C.R. 424 [hereinafter *PSAC*]; *Government of Saskatchewan* v. *Retail, Wholesale and Department Store Union, Local 544 et al.*, [1987] 1 S.C.R. 460.

(49) *Professional Institute of the Public Service of Canada* v. *Northwest Territories,* [1990] 2 S.C.R. 367 [hereinafter *PIPS*].

Through these four decisions, a divided Supreme Court set the first limits on the scope and meaning of the freedom of association.

Justice LeDain, speaking for the majority in the main decision in the labour trilogy, the Alberta Reference, made short shrift of the possibility that the freedom of association would protect the right of organized workers to strike. He maintained that since the freedom of association applies to a wide range of associations, not just labour unions, the freedom must be interpreted in that broader context:

> It is in this larger perspective, and not simply with regard to the perceived requirements of a trade union, however important they may be, that one must consider the implications of extending a constitutional guarantee, under the concept of freedom of association, to the right to engage in a particular activity on the ground that the activity is essential to give an association meaningful existence.(50)

He found that the freedom of association protects the right to form an association, and to belong to and maintain an association -- all of which, he noted, some Canadians may take for granted but which have been suppressed in varying degrees by totalitarian regimes around the world. Finally, he concluded that the "modern rights"(51) to bargain collectively and to strike are not fundamental rights or freedoms; they are simply rights created under ordinary legislation.(52) These views were adopted and reinforced by the majority's rulings in the other two labour trilogy decisions.

It was clear after the release of the labour trilogy that the freedom of association would not extend to protecting the right of workers to strike; however, uncertainty over the

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(50) *Alberta Reference*, p. 390 - 391.

(51) Commentators have taken exception to the characterization of collective bargaining and striking as "modern rights." See for example, D. Beatty and S. Kennett, "Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies," *The Canadian Bar Review*, Vol. 67, No. 4, December 1988, p. 598; J. Sack and T. Lee, "The Role of the State in Canadian Labour Relations," *Relations Industrielles/Industrial Relations*, Vol. 44, No. 1, 1989, p. 207; J. Kilcoyne, "Developments in Employment Law: The 1986-87 Term," *Supreme Court Law Review*, Vol. 10, 1988, p. 200.

(52) *Alberta Reference*, p. 391.

scope of the freedom lingered. It stemmed from the fact that Justice McIntyre, who concurred with the LeDain majority in all three cases but wrote separate reasons, diverged in one key respect. He agreed with the majority's finding that the freedom of association did not protect the right to strike but he noted that his agreement would not necessarily preclude him from extending the scope of freedom of association to other aspects of collective bargaining.(53)

The opportunity to determine whether freedom of association could extend to other aspects of collective bargaining came in the *PIPS* case. Unlike the labour trilogy, which challenged the constitutionality of legislation aimed at prohibiting strikes, *PIPS* attacked legislation affecting another aspect of collective bargaining, recognition of the bargaining representative. The legislation subject to attack in this case gave the government of the Northwest Territories the power to control which association would represent a group of employees because the association had to be incorporated by an Act of the Northwest Territories. Previously, PIPS had represented a group of nurses who, as employees of the federal government, fell under federal jurisdiction. When, however, the nurses became employees of the NWT government, that government would not recognize PIPS as their bargaining agent by incorporating it.

In the years between the release of the labour trilogy and *PIPS* decisions, the composition of the Supreme Court had changed remarkably. Only one member of the labour trilogy majority remained on the bench, but the two dissenting justices in those cases continued to sit. Joining these three justices were four new members.(54) Though the case could have provided it with the opportunity to be more generous in interpreting the freedom of association, in the aftermath of the labour trilogy, the Court was steadfast in its narrow and restricted interpretation of the freedom. Even the then Chief Justice, Brian Dickson, who had dissented in the labour trilogy, favouring a broader interpretation of the freedom that would have included a protection of the right to strike, supported the majority's narrow interpretation in this case.(55)

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(53) *PSAC*, p. 453.

(54) Timothy J. Christian, "Labour Strikes Out Again," *Constitutional Forum Constitutionnel*, Vol. 2, No. 1, Autumn 1990, p. 11.

(55) Compare *Alberta Reference*, p. 334 - 371 and *PIPS*, p. 373 - 375.

Justice Sopinka, expressing the majority view in the *PIPS* case, summarized three propositions concerning the scope of the freedom of association which he found could be extracted from the labour trilogy. First, the freedom of association protects the freedom to establish, belong to and maintain an association. Second, it does not protect an activity, such as striking, solely on the ground that the activity is a foundational or essential purpose of the association. In other words, the freedom will not be interpreted so widely as to include protection of the objectives, purposes, or activities of an association. Third, it will protect the collective exercise of individualized Charter rights, such as freedom of expression, conscience and religion. As a result, rights of individuals protected by the Charter are also protected when exercised by a collectivity because of the scope of the freedom of association.(56)

In 1991, in another landmark labour decision, *Lavigne* v. *Ontario Public Service Employees Union*, the Supreme Court of Canada expanded the scope of the freedom of association considerably, finding by a narrow margin (4:3) that it was a bilateral or double-sided right which included the freedom not to be compelled to associate, as well as the freedom to associate. Mr. Lavigne, a community college instructor, attacked the authority of his employer to deduct certain union dues from his pay pursuant to the Rand formula. As a member of a bargaining unit he was obliged by the Rand formula to pay union dues, even though he had not joined the union. But, he did not challenge, *per se*, the compulsory deduction of union dues for collective bargaining purposes; he only challenged the deduction of dues to support matters not directly related to collective bargaining, such as funding the New Democratic Party, disarmament campaigns, and abortion rights groups. His freedom to associate, therefore, was not at issue. It was his freedom not to be compelled, through paying dues, to associate with causes that he did not personally support, that he sought to defend under s. 2(d) of the Charter. Thus, the question before the Court was whether the freedom of association -- a positive right -- also included a negative aspect, that is the freedom not to associate.

Justice La Forest, with whom Justices Sopinka and Gonthier agreed, decided that the freedom of association does indeed include the freedom not to be compelled to associate. He held that "recognition of the freedom of the individual to refrain from association is a

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(56) *PIPS*, p. 402 - 403.

necessary counterpart of meaningful association in keeping with democratic ideals."[57] He drew support for this conclusion from the United Nations *Universal Declaration of Human Rights* which states that: "1. Everyone has the right to freedom of peaceful assembly and association [and] 2. No one may be compelled to belong to an association."[58] He underlined that the freedom to associate and not to associate are not separate rights. They are opposite sides of the same coin: "these are not distinct rights, but two sides of a bilateral freedom which has as its unifying purpose the advancement of individual aspirations."[59]

Having expanded the scope of freedom of association, Justice La Forest then considered whether Mr. Lavigne's freedom not to be compelled to associate had been violated by the compulsory deduction of union dues from his pay cheque. He concluded that the deduction of dues strictly for collective bargaining purposes, which benefits union and non-union members alike, would not be a violation of Mr. Lavigne's freedom not to associate. On the other hand, the deduction of dues for other purposes, not directly related to collective bargaining goals, would infringe Mr. Lavigne's Charter rights. He explained:

> the reason the forced association is permissible [with respect to collective bargaining purposes] is because the combining of efforts of a particular group of individuals with similar interests in a particular area is required to further the collective good. When that association extends into areas outside the realm of common interest that justified its creation, it interferes with the individual's right to refrain from association.[60]

The fourth member of the freedom not to associate majority, Justice McLachlin, agreed with Justices La Forest, Sopinka and Gonthier that the freedom of association included the reciprocal freedom not to associate. She diverged from the slim majority on the question of whether Mr. Lavigne's freedom not to associate had been infringed because she interpreted the freedom more narrowly than the other three justices. She ruled that in determining whether

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(57) *Lavigne*, p. 318.

(58) *Ibid.*, p. 319.

(59) *Ibid.*

(60) *Ibid.*, p. 332 - 333.

a particular person's freedom not to associate had been violated, a court should consider the *effect* of the compelled association. If the effect of the compelled association was to force the individual personally to support ideas and values to which that person would not voluntarily subscribe, then the individual's freedom not to be forced to associate would be infringed.(61) In other words, the operative test would be whether the impugned actions forced the individual to conform ideologically. In this case, Mr. Lavigne had to contribute involuntarily to certain causes which he found ideologically offensive but his contributions did not identify him personally as an advocate of these causes and did not force him personally to agree with them: "under the Rand formula there is no link between the mandatory payment and conformity with the ideas and values to which Lavigne objects."(62) As a result, Justice McLachlin found that Mr. Lavigne's section 2 rights had not been infringed.

The remaining three justices who participated in this decision, Justices Wilson, Cory and L'Heureux-Dube, found that the freedom of association did not include the freedom not to associate.(63) They found, therefore, that Mr. Lavigne could not claim that his freedom of association had been violated. They disapproved of the expanded interpretation of the freedom of association because interpreting section 2(d) in this way would place courts in the impossible position of having to choose whose section 2(d) rights should prevail -- for example, whose section 2(d) rights should be paramount in a bargaining unit: the union members' freedom to associate or the non-union member's freedom not to associate?(64) At the end of the day, the minority finding that Mr. Lavigne's freedom of association had not been violated, coupled with Justice McLachlin's ruling to the same effect but for different reasons, resulted in a majority (4:3) conclusion, albeit based on different reasons, that the compulsory payment of union dues for non-collective bargaining purposes does not violate the freedom of association guaranteed by the Charter.

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(61) *Ibid.*, p. 342 - 345.

(62) *Ibid.*, p. 346.

(63) *Ibid.*, p. 259.

(64) *Ibid.*

Consensus favourable to unions on one issue emerged from the Justices' disparate analyses of the scope of the freedom of association in the *Lavigne* case. It was that the compulsory deduction of union dues for strictly collective bargaining purposes (that is, the application of the Rand formula) would not be construed as an infringement of section 2(d) of the Charter.

Justice La Forest, with whom Justices Sopinka and Gonthier concurred, observed that Mr. Lavigne would not have succeeded in claiming an infringement of his Charter rights if he had attacked the compulsory deduction of unions dues for strictly collective bargaining purposes. "Few would think he should not be required to pay for the services the union renders him in this context."(65) He concluded that, "insofar as the Rand formula provides for a mechanism for the payment of dues to the union for collective bargaining, it does not infringe on the freedom of association."(66) Justice McLachlin, who concurred with La Forest on the scope of section 2(d), added that the purpose of the Rand formula, in fact, was not to compel union membership but to allow a person to benefit from collective bargaining without becoming a union member.

> The Rand formula has been part of Canadian labour relations for many years. It was designed to resolve the problem of persons such as Lavigne, whose employer contracts with a union of which they do not wish to be a member. The formula permits individual employees to choose not to belong to the union, but stipulates that they must pay union dues, in order to avoid the unfairness of giving non-union employees a "free ride." In essence, while not a member of the union, the person who opts out is required to pay dues on the basis that he or she benefits from the activities of the union on behalf of all employees.(67)

Implicit in Justice McLachlin's explanation of the Rand formula -- as a mechanism permitting bargaining unit members not to be forced to become union members while allowing them to reap the benefits of belonging to the bargaining unit -- is the conclusion that the Rand

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(65) *Ibid.*, p. 329.

(66) *Ibid.*, p. 334.

(67) *Ibid.*, p. 345.

formula does not violate the freedom not to associate. It is actually a device designed "to permit a person who does not wish to associate himself or herself with the union to desist from doing so."[68] As such, it would be incongruous to find that this device infringes one's freedom not to associate.

Finally, an indirect vote of confidence for the Rand formula, in this case, came from the Justices who dissented on the scope of the freedom of association. Since they found that the freedom of association did not encompass the freedom not to associate, it was unnecessary even to consider whether the Rand formula violated a non-union member's section 2(d) rights by forcing the person to help finance the union's activities.

B. Freedom of Expression - Charter s. 2(b)

Section 2(b) of the Charter declares freedom of expression to be a fundamental freedom. The scope and meaning of this fundamental freedom, like the freedom of association, has been elaborated by the courts. Questions of particular concern in the realm of labour relations have included whether the freedom of expression encompasses activities such as picketing and paying union dues.

In *Dolphin Delivery* the Supreme Court of Canada observed that all forms of picketing involve at least some element of expression. The Court then examined whether the particular type of picketing at issue in this case would be the sort of expression that would have Charter protection. Dolphin Delivery Ltd. sought an injunction to restrain the union's secondary picketing, which was designed to put economic pressure on it, as a third party and subcontractor of the picketers' employer, and to force it to cease doing business with the employer.

The Court ruled that all picketing, whether it is of the employer or a subcontractor of the employer, is designed to bring economic pressure on the person picketed and to express the union's position: "The union is making a statement to the general public that it is involved in a dispute, that it is seeking to impose its will on the object of the picketing, and that it solicits

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(68) *Ibid.*, p. 347.

the assistance of the public in honouring the picket line."[69] It therefore concluded that an injunction restraining the picketing of Dolphin Delivery Ltd. would infringe the union's freedom of expression. On the other hand, since the Court had ruled, as a preliminary matter, that the Charter did not apply to the private dispute between Dolphin Delivery and the union, the determination that secondary picketing constituted a form of expression protected by the Charter was academic.

A few years later the Court revisited the issue of injunctions restraining picketing as a violation of freedom of expression in a case involving the B.C. Government Employees Union (*BCGEU*). This time the ruling was not abstract, since the Charter was found to apply. The government union was on lawful strike and its members who worked in the Vancouver courthouse were picketing the premises. The Chief Justice of British Columbia, immediately after passing through the picket line on his way into work, went to his chambers and, on his own motion, without notice to the union, issued a restraining order to prohibit picketing at any of the provincial courthouses. The Chief Justice based his order on the finding that the picketing of the provincial courthouses constituted a criminal contempt of court. The question before the Supreme Court of Canada, when the case arrived there, was whether the Justice's restraint on picketing infringed the union's freedom of expression.

Citing *Dolphin Delivery* as its precedent, the Supreme Court ruled that picketing in the context of a labour dispute contains an element of expression which attracts the protection of section 2(b) of the Charter provided that it is, as was the case here, peaceful and accompanied by no violence or destruction of property.[70] In addition, the Court noted that the picketing in this case, though lawful from a labour relations perspective, was unlawful from the criminal law perspective, as it constituted a criminal contempt by restricting public access to the courts. Nevertheless, the unlawfulness of the peaceful picketing did not bar it from the protection of section 2(b). Following *Dolphin Delivery*, where the picketing also had been found to be unlawful, the Court ruled that the constitutional validity of an injunction restraining such picketing must be determined under section 1 of the Charter.[71]

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(69) *Dolphin Delivery*, p. 588.

(70) *BCGEU*, p. 225.

(71) *Ibid.*

In the *Lavigne* case, where the constitutionality of the compulsory check-off of certain portions of Mr. Lavigne's union dues was tested primarily as a violation of his freedom of association, the issue of the violation of his freedom of expression was also raised. Though the Justices wrote separate reasons, they were unanimous in finding that the impugned monetary contributions in this case did not violate Mr. Lavigne's freedom of expression.

Justice La Forest, with whom Justices Sopinka, Gonthier and McLachlin concurred, found that Mr. Lavigne's compulsory payments to the union did not constitute an expressive activity and, thus, would not receive the protection of the Charter. Based on the Court's decision in *Irwin Toy*, a landmark freedom of expression case, the Court ruled that expressive activity warranting the protection of the Charter's section 2(b) must attempt to convey meaning.(72) It found that Mr. Lavigne's payment of dues destined to fund, in part, union causes with which he did not align himself was not an activity that would convey meaning for him by putting words in his mouth. Therefore, his freedom of expression had not been violated:

> [T]he manner in which the union expends its funds would properly be regarded as the expression of the opinions and positions of the union *qua* corporate entity. It would not be regarded as an expression of the thoughts and opinions of the many individuals who contribute to the union coffers.(73)

Justice Wilson, with whom Justices L'Heureux-Dubé and Cory concurred, agreed with the other members of the panel on this point. Justice Wilson wrote that the incorporation of the Rand formula in the collective agreement, which compelled all members of the bargaining unit to pay union dues, including non-union members like Mr. Lavigne, did not prevent Mr. Lavigne from expressing his personal views: "It is a built-in feature of the Rand formula that union activities represent only the expression of the union as the representative of the majority of employees. It is not the voice of one and all in the bargaining unit."(74)

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(72) *Lavigne*, p. 339.

(73) *Ibid.*, p. 340.

(74) *Ibid.*, p. 281.

C. Right to Life, Liberty and Security of the Person - Charter s. 7

Section 7 of the Charter states that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Although this right is not usually invoked in Charter challenges in the labour field, it has been considered in a few cases.

In *United Nurses of Alberta* v. *Attorney-General for Alberta,*[75] the union was found to be in criminal contempt for ignoring court-registered orders of the Alberta Labour Relations Board to desist from striking. Criminal contempt is an offence which exists at common law and is preserved in its uncodified form by section 9 of the *Criminal Code*. The union argued that the common law offence of criminal contempt violates section 7 of the Charter because it is not codified and is vague and arbitrary.

A slim 4:3 majority of the Supreme Court of Canada ruled that the common law offence of criminal contempt did not violate section 7 of the Charter. As a preliminary matter, the Court stated it would assume, based on the *BCGEU* case (an earlier criminal contempt case) that the Charter applied to the court's criminal contempt order. It then proceeded to consider whether the denial of liberty (imprisonment) which could result from this order abridged the principles of fundamental justice because the offence was too vague and arbitrary. The court examined the elements of the common law offence in detail and concluded that they were neither vague nor arbitrary, hence section 7 of the Charter was not violated.[76]

In a case involving longshoremen, their union sought protection from government action also through section 7 of the Charter.[77] The union challenged the constitutionality of the *Maintenance of Ports Operations Act*, which terminated an ongoing lock-out, extended the duration of the already-expired collective agreement, and forbade striking during the extended term of the agreement. The union argued that this legislation had in effect ordered its members back to work and to comply with the legislatively revived collective agreement under threat of

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(75) [1992] 1 S.C.R. 901 [hereinafter *UNA*].

(76) *Ibid.*, p. 929 - 933.

(77) *International Longshoremen's and Warehousemen's Union - Canada Area Local 500 et al.* v. *R.*, [1992] 3 F.C. 758 (F.C.A.D).

penal sanctions for non-compliance. Therefore, the union claimed that the Act violated the right of individual workers to choose not to work under terms imposed by Parliament which they had rejected earlier and collectively in a democratic vote.(78)

The Federal Court of Appeal (the highest level to which this case has proceeded so far) ruled that the workers' *individual* rights were not infringed by the Act. For example, the workers were still free to exercise such individual rights as the right to retire, take leave, resign or not show up for work for any other valid reasons. The Court of Appeal found that the only right which the workers could not exercise as a result of the legislation was their collective right to strike. Section 7 of the Charter, however, would not apply to this collective right; it protects liberty and security of the person only as individuals' rights, not as collective rights.(79)

Finally, the Court remarked that it felt the union was trying to achieve under cover of the section 7 right to liberty that which the union could no longer achieve under section 2(d), once the Supreme Court had ruled in the labour trilogy that section 2(d), the freedom of association, did not protect the right to strike. It concluded: "Union members as a collective group cannot do indirectly under section 7 what they cannot do directly under paragraph 2(d)."(80)

D. Equality Rights - Charter s. 15

In Charter-related labour cases, section 15, like section 7, has not received much attention. On the occasions where serious consideration has been given to the equality rights guarantee in section 15, mandatory retirement has been the matter under attack. In one case, *McKinney*, the Supreme Court of Canada ruled on whether the university's mandatory retirement policies violated section 15, even though the ruling was moot because the Court had already found that the Charter did not apply to the university. In another mandatory retirement case,

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(78) *Ibid.*, p. 766.

(79) *Ibid.*, p. 767 - 769.

(80) *Ibid.*, p. 770 - 771.

Douglas College, the Charter did apply to the employer but the substantive question of whether section 15 had been violated was not before the Court. The case had been brought only to settle preliminary questions of the Charter's application.(81) Nonetheless, the Court made some significant statements in this case, as well as *McKinney*, with respect to the application of section 15 to collective agreements and government policies.

Section 15 of the Charter guarantees that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Given the wording of this section, for it to come into play and protect people from discrimination, the alleged inequality must be contained in the "law."(82)

Therefore, in the case of mandatory retirement policies or provisions contained in collective agreements, which are said to discriminate on the basis of age, section 15 could only offer protection against such discrimination if these policies and provisions constituted "law." In both *McKinney* and *Douglas College*, the Court ruled that mandatory retirement polices and provisions would be interpreted as "law" for the purposes of triggering section 15.(83)

The Court's rationale for interpreting "law" broadly to reach beyond the ordinary understanding of the word -- usually meaning statutes, government regulations, municipal by-laws, and judge-made law -- involved practical considerations. It noted that if "law" were construed narrowly to mean simply formal types of law-making, like statutes and regulations, then it would be easy for government to circumvent section 15 of the Charter by incorporating discriminatory policies and rules only in contracts and policies, not in formal laws.(84)

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(81) *Douglas College*, p. 578.

(82) *McKinney*, p. 276.

(83) *McKinney*, p. 276 - 277 and *Douglas College*, p. 585.

(84) *McKinney*, p. 277 and *Douglas College*, p. 585.

In *McKinney*, the Court went on to rule that if the Charter had applied to the university, it would have had no hesitation in finding that the mandatory retirement policies of the university violated section 15 by discriminating on the basis of age. Whether or not this discrimination could be justified and ultimately withstand Charter review, the Court found, would be a matter to be resolved under section 1 of the Charter. In *Douglas College*, the Court did not specifically rule on whether the mandatory retirement provisions of the collective agreement violated section 15, but given the holding in *McKinney* it is not difficult to imagine what the Court's finding would have been, had it been asked to rule on the question.

E. The Scope of Rights and Freedoms in Labour Cases

The Supreme Court's broad interpretation of section 15 of the Charter to apply to public sector collective agreements contrasts sharply with the Court's narrow interpretation of section 2(d) as it applied to collective bargaining rights and the right to strike. On the other hand, a generous reading was applied to section 2(d) in the freedom not to associate case. In the context of labour cases, the Court appears to lack a consistent approach toward interpreting the scope and meaning of the Charter rights. As some commentators have suggested, the type of interpretation adopted in a particular case, whether narrow or wide, seems to be linked to the type of interests being asserted, individual or collective. They conclude that the Court is more comfortable attributing a wide scope to a right when an individual's interests have been asserted:

> [T]he Court's approach toward the interpretation of subsection 2(d) [or other Charter rights for that matter] in a labour relations context, whether it should be generous and expansive or restrictive and cautious, depends heavily on the nature of the claims being asserted and the values of the individual judges concerning the protection of collective rights and individual rights and freedoms.(85)

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(85) B. Etherington, "*Lavigne* v. *OPSEU*: Moving Toward Or Away From A Freedom To Not Associate," *Ottawa Law Review*, Vol. 23, No. 3, 1991, p. 533 at 545.

A number of commentators have been particularly critical of the Supreme Court of Canada's narrow interpretation of section 2(d) in the labour trilogy cases.[86] Some of these critics have ascribed ulterior motives to the Court, suggesting that the freedom was narrowly defined so that the Court could avoid having to subject labour legislation to the rigorous tests of reasonableness and justifiability under section 1 of the Charter.[87] For example, Professor England wrote:

> It is a "cop-out" for the courts to interpret the s. 2 "freedoms" ultra-narrowly just to avoid the tough policy decisions that s. 1 requires. Indeed, the Supreme Court of Canada warned against this danger in *Hunter* v. *Southam Inc.*, holding that the difficulties that might arise under s. 1 should be irrelevant when giving meaning to s. 2. It may well be true that the courts are ill-equipped to act as social engineer in collective bargaining matters, and that s. 1 is anti-democratic in requiring the courts to oversee legislative choices. However, if that is what the language of the *Charter* decrees, so be it.[88]

On the other hand, even if the courts were to interpret Charter rights more generously to include collective interests, such as the right to bargain collectively, these interests could still be defeated at the section 1 stage of Charter review. After all, the courts would not necessarily lose their results-oriented, pro-individual rights approach when proceeding to the third level of Charter inquiry and performing section 1 analyses. The following overview of the Supreme Court's treatment of specific labour issues and its section 1 analyses in labour cases seems to bear this out.

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(86) See for example, M. MacNeil (1989) p. 86; G. England, "Some Thoughts on Constitutionalizing the Right to Strike," *Labour Law Under the Charter - Proceedings of a Conference*, Queen's Law Journal and Industrial Relations Centre, Kingston, 1988, p. 168; D. Beatty, "Labouring Outside the Charter," *Osgoode Hall Law Journal*, Vol. 29, No. 4, 1991, p. 839.

(87) See, for example, Fudge (1988), p. 80 and England (1988), p. 176.

(88) England (1988), p. 176.

RESULTS OF COURT REVIEWS OF SPECIFIC LABOUR ISSUES

Many of the labour-related Charter challenges considered by the Supreme Court of Canada have been disposed of by the majority of the Court at the first or second level of Charter inquiry -- that is, by determinations that the Charter does not apply to the impugned activities or that the impugned activities did not violate a specific right. For example, a majority of the Court has ruled that the Charter does not apply to a court order restraining secondary picketing in a private labour dispute (*Dolphin Delivery*); it does not apply to the mandatory retirement policies of universities (*McKinney*) or to the corporate by-laws of a union federation (*Tomen*). Also, the Court found that the law of criminal contempt does not violate a Charter right when applied to a union for defying a directive not to strike (*UNA*) and, most significantly for unions, the Court found that legislation restricting the right to strike or other collective bargaining rights does not infringe Charter rights (*labour trilogy* and *PIPS*).

Only a handful of Charter challenges related to labour issues have proceeded to the final level of Charter review -- the Court's analysis of the reasonableness and justifiability of the impugned Charter infringement pursuant to section 1. In a few of these cases (*Dolphin Delivery* and *McKinney*), the Court embarked on the section 1 odyssey even though it was not strictly compelled to do so, since the Charter issues had been properly resolved at prior stages of its Charter review. Altogether, so far, the Supreme Court of Canada has undertaken section 1 analyses in only a handful of labour-related Charter challenges (*Dolphin Delivery*, *BCGEU*, *Lavigne*, and *McKinney*). In all these cases, the Court concluded that the restrictions on the activities which had been found to violate a Charter right were reasonable and justifiable. Therefore, the impugned activities have all withstood the Court's review under section 1.

A. Injunctions Restraining Picketing

In *Dolphin Delivery*, the Court found that the Charter did not apply to an injunction imposed to restrain secondary picketing in a private sector labour dispute. The trial judge had granted the injunction, finding that the picketing would constitute the common law tort of inducing breach of contract and, thus, would be unlawful. The Supreme Court of Canada

found that the injunction constituted an infringement of the would-be picketers freedom of expression. Normally, when a Charter right has been infringed, the "burden of proof" (the responsibility for proving that the infringement is justified) rests with the party supporting the limitation, in this case Dolphin Delivery Ltd. However, no evidence was adduced by Dolphin Delivery Ltd. to justify the infringement of the union members' freedom of expression. The Court found that in this case producing such evidence was not necessary because the company's concern was obviously pressing and substantial -- that is, it would obviously suffer economically if the injunction restraining picketing were not imposed and the point did not need to be substantiated.(89)

In terms of the balancing of interests required under section 1 review, the Court found that, while picketing is an important weapon for employees involved in a labour dispute with their employer, it should not be permitted to harm anyone else who is not the *primary* employer and, therefore, not a party to the contract negotiations. Therefore, restrictions on secondary picketing -- that is, picketing of a third party not directly involved in the labour negotiations and dispute -- would be reasonable and justified under section 1 of the Charter.(90)

The Court's section 1 reasoning and analysis is based on the assumption that secondary picketing would have caused real economic harm to Dolphin Delivery Ltd. Unfortunately, no factual basis, in the form of real evidence, was presented to lend credibility to this conclusion. As a result, the Court left itself open to strong accusations of an anti-union bias. The comments of Professor Manwaring are illustrative:

> The meaning or significance attached to the facts by the Court was derived from a number of assumptions about the strength of unions and the effectiveness of picketing which determine the course of Mr. Justice McIntyre's judgment. The decision is convincing only if these assumptions are accepted. Unfortunately, the assumptions appear to be strongly influenced by traditional judicial attitudes towards unions.(91)

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(89) *Dolphin Delivery*, p. 590.

(90) *Ibid.*, p. 590 - 591.

(91) Manwaring (1987), p. 416.

> It is much easier to justify the granting of injunctions if you assume that the union movement is so powerful that its picketing will inevitably inflict major harm. ... Obviously, if we did not assume that the picketing would have these effects, it would be much easier to argue that picketing is a reasonable exercise of the right to freedom of expression. As long as the courts operate on these kinds of assumptions, no secondary picketing can ever be justified. The assumptions permit the court to avoid the important issue which is the extent to which such picketing actually causes harm. Even worse, it becomes impossible ever to know the answer to this question because the decision of the Supreme Court of Canada in this case means that all secondary picketing is automatically restrainable and we will never acquire any real evidence about its effects. If one's priority is to protect the property interests of employers this may be no great cost, but if we are really concerned about protecting the rights enshrined in the *Charter*, this seems to be an inappropriate way to proceed.(92)

Ironically, Parliament left property rights out of the Charter when it was enacted,(93) but in *Dolphin Delivery* the Court gave these non-Charter rights precedence over freedom of expression:

> The economic interests of a business are pitted against the economic interests of the unionized workers, and in this battle the Court holds that the workers' right to freely express their views through picketing must defer to the rights of business.(94)

The appearance of an anti-union bias, unfortunately, was no less evident in the Supreme Court's next section 1 analysis of a freedom of expression case challenging restraints on picketing, the *BCGEU* case. In this case, the Chief Justice of B.C., on his own motion and *ex parte* (without first notifying the union) issued an injunction restraining courthouse workers, who were legally on strike, from picketing at all provincial courthouses. His justification for the injunction was that the picketing constituted criminal contempt of court.

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(92) *Ibid.*, p. 419 and 421.

(93) Hogg (1992), p. 788, 1023, 1028, and 1030.

(94) MacNeil (1989), p. 111.

The Supreme Court of Canada found that B.C.'s Chief Justice had correctly concluded that the picketing of the courthouses of B.C. constituted a criminal contempt. It noted that conduct designed to interfere with the proper administration of justice constitutes criminal contempt of court, and the picketing in question would interfere in that way:

> Picketing of a commercial enterprise in the context of an ordinary labour dispute is one thing. The picketing of a court-house is entirely another. A picket line both in intention and in effect, is a barrier. By picketing the court-houses of British Columbia, the appellant Union, in effect, set up a barricade which impeded access to the courts by litigants, lawyers, witnesses, and the public at large. It is not difficult to imagine the inevitable effects upon the administration of justice.(95)

At the section 1 stage of review, the Supreme Court balanced the union members' right to express themselves by picketing and the public's right to unobstructed access to the courts. It was no contest, in the Court's view. The rights of individual members of the public to access the court system greatly out-weighed the unions members' collective right to express themselves by picketing. What is remarkable about the Court's conclusion here is that it flies in the face of affidavit evidence submitted by a member of the B.C. Law Society -- one of the individuals whose right of access to the courts the Supreme Court of Canada assumed would be impeded -- which stated, in part: "I had occasion to observe that the British Columbia Government Employees' Union picket line was orderly and peaceful. Persons appearing to have business inside the Courthouse entered and left the building at will and at no time appeared to be impeded in any way by the picketers."(96)

The Supreme Court's section 1 analysis in this case turned on the assumption that the picketing of the courthouses "could only result in massive disruption of the court process of British Columbia, and the consequential interference with the legal and constitutional rights of Canadian citizens."(97) Once again, the Court's section 1 analysis was based on innate judicial

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(95) *BCGEU*, p. 232.

(96) *Ibid.*, p. 221.

(97) *Ibid.*, p. 248.

knowledge of picket lines rather than real evidence. It too elicited critical reactions from union sympathizers and fuelled their allegations that the courts are anti-union and predisposed not to uphold the collective interests of unionized workers.

The Supreme Court's section 1 analysis in both *Dolphin Delivery* and *BCGEU* indicated that, although picketing is a protected form of expression, in the courts' mind it is not a highly-valued type of expression that warrants vigilant judicial protection. When the right to exercise this collective form of expression competed with other individual rights, the latter won easily.

B. Compulsory Check-Off of Union Dues

In the *Lavigne* case, a four-member majority of the Court found that the freedom of association includes the freedom not to be compelled to associate. But one of the members of the majority, Justice McLachlin, differed from her colleagues on the question of whether Mr. Lavigne's freedom not to associate had in fact been violated. She found that it had not, since the compulsory deduction of union dues from his pay did not in any way force him to conform to the ideological perspective of the union.

On the question of whether section 2(d) included the freedom not to associate, the three dissenters who found that the freedom of association did not include this corollary, plus Justice McLachlin, formed a four-member majority on the question of the violation of Mr. Lavigne's freedom of association (albeit for different reasons). The other three Justices, La Forest, Sopinka, and Gonthier JJ., continued on, however, with a section 1 inquiry to determine whether the compulsory check-off of union dues was a reasonable restriction to place on Mr. Lavigne's freedom not to associate.

They found that the state's objective in providing for compulsory check-off of dues is to ensure that unions have the resources and the mandate necessary to play a role in collective bargaining, that is to encourage union democracy, and to permit unions to be players in the broader political, economic and social debates in society.[98] They concluded that the compulsory deduction of union dues from employees' pay cheques, as the means chosen by the

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(98) *Lavigne*, p. 334 - 335.

state to advance these objectives, was reasonable, since the decisions as to how to expend the collected funds would be made democratically. They also noted that the judiciary would be reluctant to take on the responsibility of determining the proper and improper allocation of union dues on a case-by-case basis, which would be the result if the Court were to decide in this case that the limitations on Mr. Lavigne's section 2(d) rights were not demonstrably justified in a free and democratic society.[99]

This last remark is illuminating in that it suggests the Court's analysis may have been swayed by practical considerations. The Justices did not want their decision to "subject the courts to an endless stream of frivolous claims challenging compelled financial contribution[s]."[100] Because of these considerations, the final result is that the entire Court, in spite of its three-way split, ultimately upheld the compulsory check-off of all portions of union dues -- though for very different reasons.

C. Mandatory Retirement Policies

In McKinney, the majority of the Court embarked upon its section 1 analysis in spite of the fact that it had ruled that the Charter had no application to the mandatory retirement policies of universities. Specifically, the Court considered whether mandatory retirement policies that discriminate on the basis of age are a reasonable limit within section 1 of the Charter.

It noted that the universities' objectives in these policies were twofold: to maintain the universities' standards of excellence by permitting flexibility in faculty renewal; and to enable the tenure system, which provides job security for a set period, to operate effectively and preserve academic freedom. It found that mandatory retirement policies were rationally connected to these objectives and that the discrimination caused by such policies was justifiable when the personal detriment to the individual being forced to retire is weighed against the benefits, both to society as a whole and to the university, which derive from maintaining these policies.[101]

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(99) *Ibid.*, p. 339.

(100) *Ibid.*

(101) *McKinney*, p. 281 - 289.

The Court also considered the question of whether Ontario's *Human Rights Code, 1981* violated the equality rights section of the Charter (section 15) in that only if employees were between the ages of 18 and 65 years did the Code recognize their right to equal treatment with respect to employment without discrimination because of "age." Thus, the Code provided no protection against employers' policies requiring employees to retire at age 65. The Court found that the differential treatment of employees on the basis of age permitted by the *Human Rights Code* constituted discrimination under section 15 of the Charter and violated section 15 by denying employees over 65 of the right to equality before and under the law and the equal protection of the law.(102) Consequently, the Court was mandated to determine whether the discriminatory treatment permitted under the Code was reasonable and justifiable pursuant to section 1 of the Charter.

First the Court considered the objectives behind the discriminatory provisions of the Code -- mainly to protect the integrity of pension systems, to provide for labour force revitalization, and to preserve the right of workers to bargain for and organize their own terms of employment -- and concluded that these objectives were important in a free and democratic society.(103) Next, the Court found that the impugned legislation was a reasonable means for achieving these objectives and imposed minimal limitations on employees' equality rights. The impugned legislation "simply reflects a permissive policy. It allows those in different parts of the private sector to determine their work conditions for themselves, either personally or through their representative organizations."(104) In other words, the impugned legislation simply allowed employers and employees to maintain the status quo. The Court concluded that the Code discriminated against persons over 65 years of age; however, given the benefit to society of preserving pension systems, the Ontario legislature's permission to treat employees over 65 differently by imposing mandatory retirement was reasonable and justifiable. Thus, the impugned provisions of the Code were saved under section 1.

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(102) *Ibid.*, p. 290.

(103) *Ibid.*, p. 302.

(104) *Ibid.*, p. 312.

In effect, the Court opted to defer to the wisdom of the legislators in this case by stating: "generally, the courts should not lightly use the Charter to second-guess legislative judgment as to just how quickly it should proceed in moving forward towards the ideal of equality."[105] The result is that the Court has left it up to the individual legislatures to decide whether or not to ban mandatory retirement policies.

CONCLUSIONS

The optimism which brightened some labour commentators' Charter forecasts in the mid-1980s has since been extinguished by the disillusionment produced by the *labour trilogy*, *PIPS*, and other landmark rulings:

> [T]he instincts and original predictions of those who were sceptical and critical of modifying our system of government by the addition of a process of constitutional review has proven to be correct. The position they took against those who were more sanguine about the *Charter*'s prospects essentially has prevailed.[106]

Thus, discussions which were at one time dedicated to speculating over the potential influence of the Charter upon labour relations now have turned to analyzing trends in the various Charter rulings and their impact.

A. Trends

Though well-armed by the Charter, the courts have chosen not to "second-guess" the wisdom of the legislators, and rather than become the champions of workers' collective rights have been extremely cautious in their interpretation and defence of such rights. The paucity of cases which have proceeded to the final, section 1 stage of Charter review at the Supreme Court of Canada seems to reflect the Court's aversion to dealing with purely collective rights or purely labour relations matters, such as the right to strike. Essentially, these matters

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(105) *Ibid.*, p. 318.

(106) Beatty (1991), p. 860.

have been banished from the realm of Charter review by the Court's narrow interpretation of freedom of association.

In contrast, when a rights issue has been raised in a labour-related Charter case which can be construed as having an individual focus, the courts have met the challenge and carried out a full-fledged Charter review. For example, the Supreme Court of Canada carried out a complete review in cases which sought protection of the right of an employee not to be compelled to pay certain union dues, the right of a professor to work after age 65, the right of the public to have unimpeded access to provincial courthouses, and the right of a third party not to have its business harmed by picketing. The courts are apparently more accustomed to dealing with rights that attach to individuals than to groups.

> The court is comfortable with the notion of taking measures to protect the individual worker, but it is not at all convinced of the desirability of enhancing the power of workers generally by recognizing a constitutional status for the institutions of collective bargaining and striking. The failure to have achieved that status will make it very difficult for the labour movement to be successful in the future in enhancing collective rights. It may mean, however, that labour strategies are more likely to be successful when aimed at enhancing individual worker rights.(107)

B. Impact

A number of commentators have concluded that the political and not the judicial arena may be the best venue for preserving or expanding workers' collective rights, given the courts' predisposition to champion individual rather than collective rights:

> [U]nions should not depend on section 2(d) for enhancing collective workplace rights. Once policy choices are translated into legislation, the court will be exceedingly reluctant to interfere with the wishes of the legislature by second guessing the effectiveness of the policy unless there is a clear infringement of constitutional rights. In fact, Charter litigation, if the court

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(107) Michael MacNeil, "Recent Developments in Canadian Law: Labour Law," *Ottawa Law Review*, Vol. 21, No. 2, 1989, p. 479 at 510.

> continues to emphasize the individual aspects of Charter protection, may ultimately increase individual rights at the expense of the group. Thus, to preserve or expand collective rights, the unions may be well advised to pursue a political strategy.[108]

For some, the effect -- being shut out from Charter review in matters of collective bargaining rights and left only with recourse to political forces -- is seen positively:

> What the court has done is simply confirm that the regulation of our industrial relations system belongs in the political arena where it has always been. It should be kept in mind that over the years trade unions have enjoyed much greater success in obtaining legislative gains than they ever had in obtaining judicial victories.[109]

But for others, this result is seen in a more negative light. They point out that legislators could as easily dismantle legislative schemes protecting unionized labour as fortify them.

> The majority decisions of the Supreme Court in the three right to strike cases provide a strong signal to governments across Canada that they are free to roll back workers' traditional legislative freedoms to bargain collectively and to strike.[110]

> [I]t can be expected that the state will, if economic conditions make it necessary to ensure the long term survival of capitalism, take whatever steps it deems necessary to undermine the power of trade unions, including the dismantling of collective bargaining structures.[111]

Though the likelihood of such a scenario unfolding in good economic times may be slim, one need only look to recent legislative reforms in New Zealand to realize that, in a weak economy, the dismantling of workers' collective rights could be a real possibility. In May

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(108) Lorna A. Pawluk, "Freedom of Association in Labour Relations," *The Advocate*, Vol. 49, November 1991, p. 905 at 917.

(109) Donald D. Carter, "Canadian Labour Relations under the Charter - Exploring the Implications," *Relations Industrielles/Industrial Relations*, Vol. 43, No. 2, 1988, p. 305 at 307.

(110) Fudge (1988), p. 90.

(111) MacNeil (1989), p. 506.

1991, the *Employment Contracts Act* took effect in New Zealand, undoing that country's established system of industrial relations dating back to 1894. The Act overhauled the labour relations regime by allowing employers and workers to negotiate either individual or collective contracts and, effectively, gave employers the power to dictate whether a collective or individual contract will be used.(112) The potential for the Charter and the courts to guard against such an occurrence in Canada, in view of developments to date, appears remote.

Aside from leaving the advancement of workers' collective rights to the world of politics, the courts' Charter decisions also have prompted new speculation among academics and lawyers, this time over the courts' motives. For many labour commentators, the courts' failure to constitutionalize workers' collective rights simply confirms proof of the anti-labour mind-set generally attributed to the judiciary.

> Just as the sceptics predicted, the Supreme Court of Canada's *Charter* decisions on labour and employment law read as the latest chapter in an uninterrupted tale, whose beginnings reach back to the Industrial Revolution and even earlier times. A close reading of the *Charter* decisions which the Supreme Court has authored shows precisely the same bias against the interests of workers and their unions that plagued the common law rules of tort and crime employed by the judges to control the behaviour of the working class throughout most of the nineteenth and first half of the twentieth centuries.(113)

Some commentators, Professor Beatty for example, have suggested that the refusal of the Supreme Court of Canada to "second-guess" legislators' labour policies may be directly linked to the Conservative government's appointments to the Court. Following the first few years of Charter litigation at the Supreme Court level, which were marked by judicial activism, the Court's decisions have become more restrained and divided. In this same time period, six positions vacated on the bench have been filled by Prime Minister Mulroney's appointees.(114)

Professor Morton, however, finds the explanation for the Court's moderate approach is not its conservative roots. Rather, the Court's restraint reflects the difficult tension

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(112) Robert Reid, "Crushing Labor in New Zealand," *Multinational Monitor*, June 1992, p. 17 and 19.

(113) Beatty (1991), p. 842; see also England (1988), p. 204.

(114) Morton (1992), p. 9.

which the Charter creates between parliamentary democracy and the judicial review of government.

> [T]here is not consistent empirical support for Beatty's thesis that Prime Minister Mulroney has used his appointment power to shape an ideologically "conservative" or self-restrained Supreme Court.
>
> A more probable explanation for the drop in success rate of *Charter* claims after 1985 is a philosophical shift among some of the same Justices who began the Court's *Charter* interpretation in 1984. In retrospect, these first two years can be seen as a sort of *Charter* "honeymoon." Not only were many of these first fifteen decisions strongly activist, all but two were unanimous. The written judgments in these decisions manifested a very sanguine -- some might say, naively optimistic -- view of the Court's new role under the *Charter*.
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> ...
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> As the Court ventured deeper into "Charterland," it was no coincidence that the success rate for *Charter* cases began to fall precipitously, while at the same time, the number of dissenting opinions soared. ... The falling success rate and growing division on the Court both reflect the same hard reality: the inescapably contentious character of modern judicial review.
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> ...
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> There are real tensions between judicial review of constitutional rights and parliamentary democracy, and it was inevitable that these would surface and produce disagreement among the Justices.[115]

This conclusion certainly appears to be supported by Charter jurisprudence on labour relations issues. The first labour cases reached the Supreme Court after the "honeymoon" was over, and as the Court has ventured farther into the labour territory of "Charterland" the decisions of the Court have become more divided. It is little wonder, under these circumstances, that the political arena now seems a safer haven for the protection of workers' collective interests than the courts.

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(115) *Ibid.*, (1992), p. 10, 11 and 14.

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